IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.66 OF 1997

State of Maharashtra (Through Karveer Police, for the complainant Pasha Ibrahim Shaikh (Mohammad) R/o. 117, Aaramnagar 2, in front of Machchimar Bus Stop, Varsova Road, Andheri (West), Mumbai.) ... Appellant

Versus

Madhavrao Ramji Ghodake, age 52 years, R/o. Shastrinagar, Plot No.1, Kolhapur, Dist. Kolhapur.) ... Respondent

ALONG WITH

CRIMINAL REVISION APPLICATION NO.298 OF 1996

Pasha Ibrahim Shaikh (Mahammad) r/o. 117, Aaramnagar 2, Opp. Machimar Bus Stop, Versova, Andheri (W), Bombay.) ... Petitioner

Versus

1. Madhavrao Ramji Ghodake, age 52 years, R/o. Shastrinagar, Kolhapur, Dist. Kolhapur.)
2. State of Maharashtra (Karveer Police Station C.R. no.253/94 Sessions Case No.37/96 Kolhapur.)) ... Respondents

Ms. P.H. Kantharia, A.P.P. for the State.

Mr. K.S. Patil for respondent 1.

Mr. A.P. Mundargi i/b Mr. G.S. Hegde for the petitioner in Revision Application No.298 of 1996.

CORAM : SMT. RANJANA DESAI, & ANOOP V. MOHTA, JJ.

DATED : 11TH JANUARY, 2007.

JUDGMENT:- (Smt. Ranjana Desai, J.)

1. The State of Maharashtra has challenged in this appeal judgment and order dated 17/10/1996 rendered by the 3rd Additional Sessions Judge, Kolhapur in Sessions Case No.37 of 1996 whereby the respondent (for convenience, "the accused") was acquitted of offence punishable under section 307 and 504 of the Indian Penal Code (for short, "the IPC") and under section 27 of the Arms Act.

2. It is necessary to begin by giving the gist of the prosecution story. The complainant Shaikh Mahammed Pasha was serving in Mumbai as a Custom Officer for the period from 1984 to 1994. Thereafter, he resigned from that post. In the year 1989-1990, the complainant and the accused jointly purchased about 47 acres of agricultural land from one Yashvant Medhe of Village Ambewadi. The sale deed was registered in the name of the wife of the complainant, his brother, his two minor children and in the name of the wife and son of the accused.

3. It is alleged that in the year 1994, the complainant was in need of

money and, hence, he informed the accused that he wanted to dispose of his share of the said land. According to the complainant whenever he used to express his intention to sell his share of the land, the accused used to avoid the topic. Since the complainant was in need of money, he along with his two colleagues from Mumbai by name Eknath Fatak, Jayaram Rane and one Sanjay Benadikar, a resident of Kolhapur, decided to amicably settle the dispute. On 14/10/1994, the complainant along with his two friends - Fatak and Rane came to Kolhapur in the evening by Tata Mobile vehicle of the complainant. They halted at Hotel Woodland. On the next day, the complainant contacted his friend Benadikar. He called him to Hotel Woodland. Thereafter, they contacted the accused. They decided to go to the land of the accused on 16/10/1994 at about 6.00 to 6.30 p.m. Benadikar came to meet the complainant at Hotel Woodland by his Maruti car. Thereafter, the complainant, Benadikar and two of his colleagues sat in the Tata Mobile vehicle of the complainant. They reached the land of the accused at about 7.00 to 7.30 p.m. As directed by them, their driver brought the Maruti car of Benadikar also to the land of the accused.

4. All of them were sitting in the varanda of the bungalow of the accused. When they were talking to each other, the accused suddenly became furious. He went inside the bungalow and returned with a gun. On seeing the accused with gun, the complainant started running out of the varanda. The accused threatened and abused him. The complainant started running down the stairs. The accused followed him with the gun. He pointed out the gun

towards the complainant. The complainant caught that gun and directed it upwards. The accused fired the gun. The bullet went in the air. According to the complainant, when he was trying to remove the gun from the hand of the accused, there was a scuffle. In that scuffle, he sustained a head injury due to the trigger guard of the twelve bore gun. During the scuffle, the complainant and the accused fell on the ground. The twelve bore gun also fell on the ground. The complainant then started running towards Kolhapur side. The accused directed his son-in-law to fire at the complainant and ensure that the complainant does not leave. When the complainant was running towards Kolhapur all of a sudden, a jeep came near him in heavy speed. He thought that the jeep was going to dash against him. Therefore, he jumped on the left side of the road. The jeep went ahead upto a distance of 150 to 200 feet and halted there. The complainant started running to the opposite direction. When he was so running, one motor vehicle came from the front side and halted near him. Rane, Benadikar and Fatak were there in the said vehicle. The complainant sat in that motor vehicle. All of them went to the Karveer Police Station. At the Karveer Police Station, the complainant lodged his complaint, which is at Ex-16. According to the complainant, the police referred him to the medical officer. He was treated at the CPR Hospital, Kolhapur. On the basis of the complaint lodged by him, the investigation was started and after completion of the investigation, the accused came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as seven

witnesses. Star witness of the prosecution is Shaikh Mahammad Pasha- the complainant. The prosecution also examined the two friends of the complainant - PW-4 Benadikar and PW-5 Rane. The details of investigation were given by PW-6 PI Sonavane. The prosecution also examined the pancha witnesses. They are PW-1 Shivaji Salokhe, PW-2 Vasant Titave and PW-7 Arun Mohite. The prosecution relied on the report of the ballistic expert.

6. The defence of the accused was one of denial. He submitted his written statement. According to the accused, the complainant and members of his family are residing at Mumbai. In the year 1991, the complainant had allotted his share in the agricultural land to the accused on tenancy basis of yearly rent of Rs.40,000/- for the period of 14 years. Thereafter, he spent huge amount to develop that land. Therefore, the complainant now wants to cancel the agreement of tenancy and get back the said land for which the accused is not willing. According to the accused, on 16/10/1994, the complainant brought 12 to 15 persons in three motor vehicles to his land to bring pressure on him. The complainant wanted to obtain his signature. There was some dispute between them. The accused escaped from there. The complainant and his companions started going back by their respective motor vehicles. One Maruti car went ahead. The Tata Mobile vehicle was following that vehicle. On the way, the Tata Mobile vehicle met with an accident and halted on the road. The accused did not examine any defence witnesses.

7. After perusing the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution had failed to prove its case. In the circumstances, he acquitted the accused. The said judgment and order is challenged in this appeal.

8. The complainant has filed revision application being Criminal Revision Application No.298 of 1996 challenging the said judgment and order.

9. We have heard at some length Ms. Kantharia, the learned A.P.P. appearing for the State and Mr. Patil, the learned counsel appearing for the accused/respondent 1 and Mr. Mundargi, the learned counsel appearing for the petitioner / complainant in Criminal Revision Application No.298 of 1996. With the assistance of the learned counsel, we have gone through the record of the case.

10. Ms. Kantharia, the learned A.P.P. submitted that the impugned judgment and order is perverse and deserves to be set aside. She contended that the learned Sessions Judge has wrongly ignored the credible evidence of PW-3 Shaikh Mahammad Pasha – the complainant and the eye-witness account of PW-4 Sanjay Benadikar and PW-5 Jayaram Rane. The learned A.P.P. contended that the learned judge has failed to appreciate that from the scene of offence, one fired cartridge was recovered. She submitted that as per the ballistic expert's report (Ex-26), the gun produced by the accused was used for firing prior to its receipt in the laboratory and one empty fired

cartridge produced by the accused on which “KF 12” in English was written had been fired from the barrel of the said gun. She submitted that therefore, undoubtedly, the accused had used the said gun as alleged by the prosecution. The learned A.P.P. submitted that instead of appreciating the evidence on record in its proper perspective, the learned judge has unnecessarily gone on to observe that the complainant was serving in the Customs Department and he has accumulated property dishonestly. She submitted that the learned judge has unnecessarily commented on the financial position of the witnesses. She further submitted that it was wrong on the part of the learned judge to discard the evidence of the prosecution witnesses merely because they were serving in the Customs Department. The learned A.P.P. urged that the impugned judgment proceeds on the basis of surmises and conjectures. She submitted that the considerations which are not germane to the case have weighed with the learned judge and, therefore, the impugned order should be set aside and respondent 1-accused should be convicted in accordance with law. Mr. Mundargi, the learned counsel appearing for the complainant has also reiterated the same submissions.

11. Mr. Patil, the learned counsel appearing for respondent 1 accused, however, submitted that the prosecution has failed to make out its case. He submitted that a vital piece of evidence namely the injury certificate of the complainant has not been produced by the prosecution. Therefore, the prosecution story is suspect. The prosecution has only relied upon evidence

of interested witnesses. The learned counsel submitted that, therefore, the learned Sessions Judge cannot be faulted for having acquitted the accused. He submitted that in any event, the view taken by the learned Sessions Judge is a reasonably possible view, which cannot be disturbed in an appeal against acquittal. He urged that the appeal be dismissed.

12. It is well settled that this court should not interfere with an order of acquittal, if the view taken by the trial court is a reasonably possible view even if on facts it is possible to take another view of the matter. Keeping this basic principle in mind, we shall approach the present case.

13. The prosecution story is narrated by PW-3 Shaikh Mahammad Pasha – the complainant. He has stated that in the year 1990, he had purchased about 47 acres of land at Kolhapur jointly with the accused. He has stated that after retirement, he had some financial problem and hence, he wanted to sell the land but the accused was avoiding the sale. In order to persuade the accused, he decided to go to Kolhapur with some common friends. On 14/10/1994, he along with Fatak and Rane went to Kolhapur by his Tata Mobile vehicle. They stayed in Hotel Woodland at Kolhapur. On 15/10/1994, he contacted his friend Benadikar – a resident of Kolhapur. They decided to go to the accused on 16/10/1994. Accordingly, on 16/10/1994, in the evening Benadikar came to Hotel Woodland by his Maruti car. Thereafter, the complainant along with Benadikar, Rane and Fatak went to meet the accused in Tata Mobile vehicle of the complainant. Maruti car driven by Benadikar's

driver was following them. According to this witness, they reached the bungalow of the accused. They sat in the varanda of the bungalow. When they were talking to each other in the varanda, the accused all of a sudden became furious. He went inside the bungalow and came back with a gun. On seeing him with the gun, the complainant started running down the stairs. When he came down the stairs and went ahead at a distance of about 15 to 20 feet, the accused also followed him along with the gun. The accused abused and threatened him. The accused pointed out the gun towards the complainant. According the complainant, he caught the gun and raised it upwards. The accused fired the gun. The bullet went above the head of the complainant. According to the complainant, when he was trying to remove the gun from the hand of the accused, there was scuffle and he sustained head injury due to the trigger guard of the 12 bore gun. Then he and the accused fell on the ground. The 12 bore gun also fell down. According to the complainant, he started running towards Kolhapur side. The accused directed his son-in-law, who was also there, to fire at him. According to the complainant, he started running on the Kolhapur road. When he was running towards Kolhapur, one jeep came near him in heavy speed. He, therefore, jumped on the left side of the road. The jeep went ahead upto a distance of 150 to 200 feet and halted there. According to the complainant, he started running in the opposite direction. At that time, a vehicle came from the front side and halted near him. His friends Rane, Benadikar and Fatak were sitting in that vehicle. All of them then went to the police station where his complaint (Ex-16) was recorded. According to the complainant, he was then treated in

CPR Hospital, Kolhapur. His blood stained shirt was seized by the police under panchnama.

14. In the cross-examination, he has reiterated the same story. The question is whether the complainant's version should be accepted. To corroborate the evidence of the complainant, the prosecution has examined PW-4 Benadikar and PW-5 Rane, who are his very close friends. It is the case of the complainant that he had taken them to the accused so that the dispute could be amicably settled. Being close friends of the complainant, these two witnesses are interested witnesses. They are bound to support the complainant. It was necessary for the prosecution to examine some independent witnesses which the prosecution has failed to do. In our opinion, this is a serious lacuna in the prosecution case.

15. It is true that the evidence of an interested witness cannot to be discarded as a rule. One has to weigh that evidence and, in the facts and circumstances of the case, decide whether it is trustworthy or not. In this case, it was necessary for the prosecution to adduce independent evidence because it is the case of the prosecution that the complainant sustained injury to his head; that his shirt was stained with blood and that he was treated at CPR Hospital, Kolhapur. The medical evidence as regards injury sustained by the complainant would have gone a long way in establishing the prosecution case. However, the prosecution has failed to adduce the medical evidence. The injury certificate of the complainant is not on record. The case

papers of the CPR Hospital at Kolhapur are not on record. The doctor, who treated the complainant at CPR Hospital at Kolhapur has not been examined. The accused is tried for an offence under section 307 of the IPC. The prosecution has come with a case that the accused had a gun in his hand. The charge states that the accused fired a gun pointing towards the complainant. However, in the evidence, the complainant had stated that when the gun was turned upwards, the accused fired it. If the accused had fired it towards the complainant as per the charge, there would have been some injury on the person of the complainant. This case is given up in the evidence and the complainant has stated that the injury was caused to his head when he tried to raise the 12 bore gun upwards. The injury was bleeding to such an extent that in the panchnama under which the shirt of the complainant was seized, it is stated that there were blood stains on the shirt. If that is so, it is not understood why the prosecution has not produced the injury certificate of the complainant. The medical papers from CPR Hospital, Kolhapur and the evidence of the doctor, who treated the complainant are also not on record and this gives rise to an inference that the incident did not take place in the manner in which the prosecution wants the court to believe it has taken place. In fact, whether the complainant received any injury or not, is not clear from the evidence. To substantiate the theory of injury, the prosecution is relying on the complainant's evidence and the evidence of the interested witnesses viz. his friends. In the absence of medical evidence, it is difficult for this court to hold that the complainant did receive any injury as alleged on the basis of the interested evidence of the complainant's friends.

In the facts and circumstances of the case it was incumbent upon the prosecution to examine independent witnesses. There is absolutely no explanation as to why medical evidence as regards the alleged injury suffered by the complainant is not produced.

16. The prosecution theory also appears to be inherently improbable. If the accused wanted to fire at the complainant then, it was very easy for him to do so when as per the prosecution story, the accused was following the complainant with a gun in his hand pointing towards the complainant when the complainant was going down the stairs of the bungalow. It was easy for the accused to fire at him at that time. There is no reason for the accused to allow the complainant to run a long distance and follow him with a gun in his hand. If he had intention to cause death of the complainant, nothing would have been more easier than fire at the complainant as the complainant was going down the stair case. The case of the complainant is that after the incident of firing, he was running on the road towards Kolhapur and one jeep came near him in high speed. He thought that the jeep was going to dash against him. Obviously, what is suggested is that it was the accused who wanted to knock the complainant down by dashing the jeep against him. If really the accused wanted to kill the complainant, he could have easily crushed him under the jeep. There was no reason for him to allow him to escape. If the complainant had jumped on the left side as alleged, then he must have received injuries on account of that also but the prosecution has not adduced any evidence to substantiate its case that the complainant

jumped on the left side of the road. The medical evidence in that regard is also absent.

17. The prosecution has examined PW-1 Salokhe, the panch witness, in whose presence, the panchnama of scene of offence (Ex-10) was drawn. It is pertinent to note that this panch witness has admitted that he used to serve as a Manager with one Dilip Benedikar, who is the brother of PW-4 Sanjay Benadikar. Sanjay Benadikar is admittedly a very good friend of the complainant. Therefore, the evidence of this pancha will have to be examined taking into consideration the above facts. As per panchnama of the scene of offence (Ex-10), two broken buttons of violate colour and one fired cartidge were seized from the scene of offence. PW-2 Vasant Titave, is pancha to panchnama (Ex-12). Under this panchnama, shirt of the complainant having blood stains was seized. Two buttons of the shirt are shown to be missing and the remaining buttons are shown to be pink and violate in colour. The prosecution is obviously trying to match the buttons recovered at the scene of offence with the buttons of the shirt of the complainant. But, it is significant to note that this witness has stated that when he went to the spot, the work of writing of the panchnama was going on and the police informed him that these articles are found on the spot and accordingly they prepared the panchnama. Therefore, this panchnama appears to be a concocted document. Besides, PW-2 Vasant Titave and PW-7 Arun Mohite who is the second pancha to panchnama (Ex-12) under which the shirt of the complainant was seized have turned hostile. Therefore, this panchnama is not proved.

18. It is the case of the prosecution that on 17/10/1994, the accused appeared in the police station and produced a double barrel gun, empty cartridge pipe on which KF 12 special was written and his own shirt and trouser which were seized under the arrest panchnama (Ex-8). According to the investigating officer, he found one fired cartridge or round wad from the scene of offence. The investigating officer sent the gun, empty cartridge and the round wad to the ballistic expert. The investigating officer also sent the shirt of the complainant and the shirt and the trouser of the accused to the ballistic expert. The ballistic expert's reports are at Ex-26 and Ex-27.

19. The ballistic expert in his report (Ex-26) has stated that KF 12 bore shot gun empty had been fired from the left barrel of the gun. He has also stated that the double barrel gun was in working condition and that KF 12 bore gun cartridges were successfully test-fired from both the barrels of the gun. However, he has further stated that it is not possible for him to give the time of firing of the gun by the present available technique. The ballistic expert's report at Ex-27 states that no shot holes were observed on the bush shirt which belongs to the complainant. Therefore, the ballistic expert's reports do not further the prosecution case. It is also rather surprising that there are more than 300 pellets in one cartridge of 12 bore gun but not a single pellet was found on the spot.

20. It is also pertinent to note that PW-6 PI Sonawane has stated that API

Ghatage had searched the house of the accused and he had produced the panchnama about the said search. However, API Ghatage is not examined. The said panchnama is also not on record. If the search was, in fact, carried out then the police would have found the gun in the house of the accused. There would have been no occasion for the accused to produce the gun on his own at the police station. The entire story of production of the gun by the accused, therefore, appears to be a got up story.

21. It must also be noted that whereas the investigating officer has said that he visited the spot immediately, the complainant has stated that he showed the spot of incident to the police on the next day. All these discrepancies rob the prosecution story of its credibility.

22. In view of the above, in our opinion, the prosecution has failed to adduce cogent evidence to bring home the guilt of the accused. Admittedly, there is some dispute about the land between the two sides. The possibility of false involvement cannot be ruled out. In our opinion, the view taken by the learned Sessions Judge is a reasonable and possible view which does not deserve to be interfered with in an appeal against acquittal. We, however, feel that the learned Sessions Judge has unnecessarily made certain comments on the prosecution witnesses. He has observed that the two of the prosecution witnesses who are friends of the complainant are Customs Officers. He has stated that they have amassed wealth and, therefore, they

are not credit worthy. He has also commented on the character of the complainant. In our opinion, there was no need for the learned Sessions Judge to make such personal comments in criminal proceedings. He ought to have restricted himself to the appreciation of evidence. Those comments are unwarranted in the instant criminal proceedings. In any event, we find no merit in the appeal so as to interfere with the order of acquittal as the prosecution has failed to produce any evidence which would indicate the complicity of the accused. In the result, the appeal must fail and is dismissed accordingly. Needless to say that the Criminal Revision Application No.298 of 1996 also stands dismissed.

[SMT. RANJANA DESAI, J.]

[ANOOP V. MOHTA, J.]